

THE HONORABLE RICHARD A. JONES

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on behalf of
himself and other similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the United
States, *et al.*,

Defendants.

CASE NO. 2:17-cv-00094-RAJ

DEFENDANTS' STATUS REPORT

1 Pursuant to the parties' May 26, 2020 Joint Status Report, Defendants submit this status
2 report on the status of the resolution of the issues raised in three stricken discovery motions, as well
3 as on other issues. *See* Dkt. 359 at 2-3. Although Defendants proposed that the parties file a joint
4 status report, Plaintiffs rejected that offer.

5 **Discovery Motions**

6 On May 14, 2020, the Court struck four pending discovery motions and ordered the parties to
7 negotiate in an attempt to resolve their disputes without Court intervention. *See* Dkt. No. 355. The
8 Court scheduled a status conference on May 28, 2020 for the parties to report their progress, and
9 stated that additional papers should not be filed. *See* Dkt. 355. In a status report filed on May 26,
10 2020, and at the status conference on May 28, 2020, the parties reported to the Court on their
11 progress and plans to negotiate the issues. *See* Dkt. No. 359. Specifically, the parties reported that
12 they were working on a compromise that would allow Plaintiffs to contact individuals who had
13 responded to the public posting of the class notice, as Plaintiffs requested in their stricken Motion to
14 Amend the Protective Order to Contact Class Notice Responders. *See* Dkt. No. 359 at 2; *see also*
15 Dkt. Nos. 309. The parties also reported that, in an effort to resolve Defendants' Motion to Compel
16 Answers to their Interrogatories, Plaintiffs would send Defendants a list of deposition exhibits and
17 documents they intended to use as deposition exhibits but did not, and would later link a sampling of
18 those documents, and documents relied upon by their experts, to their claims. *See* Dkt. No. 359 at 2.
19 At the May 28, 2020 hearing, Defendants expressed concern that Plaintiffs had not committed that
20 their sampling would be representative of the evidence in support of their claims. Tr. at 12:22-
21 13:22.

22 The parties additionally reported that they developed a plan to attempt to resolve Plaintiffs'
23 motions to compel lesser-redacted versions of the Named Plaintiffs' A-Files and 41 other
24 documents. Under this plan, Defendants agreed to review redactions annotated by Plaintiffs, offer
25 privilege descriptions, and where possible, lift redactions. Dkt. No. 359 at 3. It was Defendants'
26 understanding from Plaintiffs' stricken motions and subsequent representations to the Court at the
27 hearings that Plaintiffs were particularly concerned with block redactions, *see, e.g.*, Dkt. No. 312 at
28

3, and sought confirmation from Defendants that the redacted content in the A-Files and documents was, in fact, privileged information, *see generally* Dkt. No. 320 at 6-7 (denying a prior motion to compel as to “[i]nformation regarding law enforcement databases,” “personally identifying information,” and “third-party law enforcement agency information”); *see also* Dkt. No. 344 (Plaintiffs statement in their reply brief to the stricken document motion that they are “*not* challenging Defendants’ redactions [over] . . . third party law enforcement information, codes, database screenshots, and personally identifying information”) (emphasis in original).

Finally, the parties reported that they would apprise the Court of any unresolved issues by June 26, 2020, and the Court scheduled a hearing on July 1, 2020 to discuss any such issues. *See* Dkt. No. 359.

Following the May 28, 2020 hearing, the parties’ negotiations resulted in the resolution of Plaintiffs’ Motion to Amend the Protective Order to Contact Class Notice Responders. *See* Dkt. No. 371 (filed under seal). Defendants made significant concessions in an effort to resolve this motion, and Defendants ultimately conceded that Plaintiffs would be afforded all relief they sought in their stricken motion, subject to very limited conditions. *See* Dkt. No. 371 (filed under seal).

Unfortunately, as further detailed below, the parties were not able to resolve their disputes related to the other three stricken motions. Defendants believe the issues in dispute have been sufficiently and extensively briefed, *see* Dkt. Nos. 289, 301, 303, 312, 316, 326, 328, 341, 344, and should any issues remain in dispute at the time of the July 1, 2020 hearing, Court intervention is now necessary to resolve said disputes.

Dkt. No. 289 (Defendants’ Motion to Compel Answers to their Interrogatories)

After discussion between the parties, on June 11, 2020, Defendants received a list of documents, by Bates numbers, from Plaintiffs. This list was comprised of documents Plaintiffs used as deposition exhibits and documents Plaintiffs considered using as deposition exhibits, but ultimately did not use. On June 17, 2020, Plaintiffs linked 32 documents – taken from the June 11 list and documents listed in reports submitted by Plaintiffs’ experts – to some, but not all, of their claims.

1 Defendants are continuing to evaluate Plaintiffs' submission. Of particular concern to
2 Defendants is the fact that, in a cover e-mail transmitted with Plaintiffs' June 17 linking, Plaintiffs
3 admitted that the documents were neither an exhaustive nor representative sample of the evidence
4 supporting their claims. Plaintiffs also stated unequivocally that they would not supplement the list.
5 Notably, some of Plaintiffs' claims were not linked to any documents, giving Defendants absolutely
6 no information about what types of documents, if any, support those claims. Defendants therefore
7 remain concerned that Plaintiffs' refusal to identify a representative sample of evidence in support of
8 their claims will advance a pre-trial litigation-by-surprise strategy, which the Rules were designed to
9 prevent as not beneficial for the parties or the Court. Accordingly, Defendants do not consider the
10 issues raised in their motion resolved. However, Defendants will continue to evaluate the sample
11 and hope to contact Plaintiffs with proposed terms for final resolution prior to the July 1, 2020
12 hearing. Defendants will report to the Court before or at the hearing whether the issues are resolved.
13 Dkt. Nos. 312 & 316 (Plaintiffs' Motions to Compel, Challenging Redactions in the Named
14 Plaintiffs' A-Files and 41 Other Documents)

15 As Defendants noted at the May 14, 2020 hearing in which this motion was discussed,
16 Defendants' viewed Plaintiffs' stricken motions as essentially a rejection of the veracity of
17 Defendants' privilege logs, and an effort to enlist the Court's assistance in "double-checking"
18 Defendants' good faith in making redactions and preparing the privilege log. The immediate cause
19 of Plaintiffs' skepticism, as reported to the Court, was a series of what Plaintiffs' characterized as
20 "block redactions." *See, e.g.*, Dkt. No. 312 at 3. Nevertheless, in an effort to resolve this dispute,
21 Defendants agreed to disclose to Plaintiffs' counsel in painstaking detail what was behind the
22 redactions in an effort to convince Plaintiffs that Defendants were redacting the documents properly
23 and consistently with the Court's relevant orders in the case. Specifically, Defendants re-reviewed
24 the documents and A-Files; withdrew redactions where possible; and provided spreadsheets to
25 Plaintiffs explaining, for each annotated redaction, what has been redacted. Defendants' effort
26 amounted to providing discrete privilege descriptions for more than 1,000 pages.

1 In addition to providing redaction descriptions, and where possible, lesser-redacted pages,
2 Plaintiffs and Defendants have met and conferred four times regarding the redactions at issue. In
3 response to Plaintiffs' specific questions during these calls, Defendants, when possible, provided
4 additional clarifications and information about the redactions, and in some instances produced even
5 lesser-redacted pages.

6 Unfortunately, Plaintiffs have responded that they are not satisfied with Defendants' efforts.
7 On June 25, 2020, Plaintiffs informed Defendants of the few particular instances where they
8 consider redaction disputes resolved; ultimately, all of the Named Plaintiffs A-Files and 39 of the 41
9 documents remain at issue.

10 Following the parties' negotiations, Defendants believe that the disputes over redactions, and
11 the parties' respective positions, should be discussed at the July 1 hearing. Following that
12 discussion, should the Court determine that *in camera* review of the documents will be helpful to
13 resolving the dispute, Defendants are prepared to produce the Named Plaintiffs A-Files and
14 documents at issue. Through discussions with Plaintiffs, Defendants believe that Plaintiffs seek to
15 essentially ask the Court to reconsider its prior rulings regarding the law enforcement privilege, and
16 to brief those issues again, in a bid to gain access to law enforcement and national security
17 information obtained from third party law enforcement agencies, which the Court has previously
18 ruled falls within the law enforcement privilege. *See* Dkt Nos. 274, 320. Defendants do not believe
19 further negotiations will be beneficial in such circumstances. Nor do Defendants believe that further
20 briefing is necessary. Rather, only a decision from the Court, following discussions on July 1 and
21 potential *in camera* review, is likely to fully resolve the issues.

22 Because of the sensitivity of the issues that will be discussed at the July 1 hearing, and
23 notably because the A-Files and some of the 39 documents still in dispute are subject to an
24 Attorneys' Eyes Only designation, Defendants request that the hearing be closed to the public.
25 Plaintiffs oppose this request.

Other Matters

Revised Certified Administrative Record

Because redactions remain at issue in several documents that are part of the Certified Administrative Record, the parties agree that the certification and production of a revised Certified Administrative Record should be stayed pending the resolution of the redaction disputes.

Defendants' Deposition-Related Clawback Requests

The parties have met and conferred on Defendants' requested deposition-related clawback requests. Defendants have requested to claw back four exhibits (Exs. 19, 22, 24, and 52/93), as well as portions of the transcripts and videos of the depositions of Chris Heffron, Matthew Emrich, Amy Lang, and Kevin Quinn. Plaintiffs previously indicated that they do not oppose the requests to claw back Exs. 19, 22, and 24, to claw back portions of Ex. 52/93, and portions of the Heffron deposition transcript/video. After further negotiations following the hearings before the Court, Plaintiffs indicated that they will not challenge the deliberative process privileges Defendants assert over Ex. 52/93. Negotiations continue on the remaining law enforcement privilege redactions in Ex. 52/93, but the parties have reached an impasse regarding the remaining deposition-related claw back requests. If the impasse remains as of July 1, following discussion of the issue with the Court, Defendants are prepared to file a motion to claw back the content remaining in dispute using the procedures outlined in the stipulated order pursuant to Federal Rule of Evidence 502(d). *See* Dkt. No. 83 at 3-4 ¶ 5.

30(b)(6) Deposition Negotiations

Defendants believe that negotiations over the scope and terms of Plaintiffs' Rule 30(b)(6) deposition of USCIS are close to completion. Plaintiffs have submitted additional topics to USCIS, which are presently under consideration. In addition, a final agreement needs to be drafted and the parties need to work out logistics and scheduling. Assuming the matter stays on its present track towards final resolution, Defendants do not foresee any need to seek the intervention of the Court.

USCIS Furloughs

Due to COVID-19, USCIS revenue from immigration fees has drastically decreased. On May 15, 2020, USCIS notified Congress of a projected budget shortfall caused by the COVID-19 pandemic and requested emergency funding of \$1.2 billion. Without additional funding, USCIS will be required to furlough more than 13,000 employees on or about August 3, 2020. USCIS began issuing furlough notices on June 26, 2020.

1 DATED this 26th day of June 2020.

2 Respectfully submitted,

3
4 JOSEPH H. HUNT
5 Assistant Attorney General
6 Civil Division
7 U.S. Department of Justice

JESSE BUSEN
Counsel for National Security
National Security Unit
Office of Immigration Litigation

8 AUGUST FLENTJE
9 Special Counsel
10 Civil Division

BRENDAN T. MOORE
Trial Attorney
Office of Immigration Litigation

11 ETHAN B. KANTER
12 Chief National Security Unit
13 Office of Immigration Litigation
14 Civil Division

LEON B. TARANTO
Trial Attorney
Torts Branch

15 BRIAN T. MORAN
16 United States Attorney

MICHELLE R. SLACK
Trial Attorney
Office of Immigration Litigation

17 BRIAN C. KIPNIS
18 Assistant United States Attorney
19 Western District of Washington

s/ Victoria M. Braga
VICTORIA M. BRAGA
Trial Attorney
Office of Immigration Litigation

20 LINDSAY M. MURPHY
21 Senior Counsel for National Security
22 National Security Unit
23 Office of Immigration Litigation

Counsel for Defendants

24 ANDREW C. BRINKMAN
25 Senior Counsel for National Security
26 National Security Unit
27 Office of Immigration Litigation
28

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Victoria M. Braga
VICTORIA M. BRAGA
Trial Attorney
Office of Immigration Litigation
U.S. Dept. of Justice, Civil Division
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 616-5573